

A bartender, who was on a leave of absence from her part-time benefit year job after she broke her arm, was in unemployment, as she was able and available to perform work for other employers that did not require her to use her arm.



THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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**BOARD OF REVIEW
DECISION**

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MEMBER

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Division of Unemployment Assistance (DUA), to deny unemployment benefits and affirm an overpayment of \$663.00 that was imposed following the claimant's departure from work on a medical leave of absence. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

After the claimant became separated from another employer, the claimant filed her claim for unemployment benefits on August 15, 2008. While collecting benefits based on that separation, the claimant subsequently worked part-time as a bartender for the instant employer from May 2009 until August 22, 2009, when she was injured at home and could no longer perform her duties. On October 28, 2009, DUA issued a redetermination finding the claimant to be on a leave of absence from this employer and, thus, ineligible for benefits, and obliging her to repay the benefits she had erroneously received. The claimant appealed the redetermination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner affirmed the agency's redetermination and denied benefits in a decision rendered on December 11, 2009 – reducing the amount the claimant was required to repay from \$828.00 to \$663.00.

Benefits were denied after the review examiner determined that the claimant was not in total unemployment and, thus, was disqualified under G.L. c. 151A, §§ 29(a) and 1(r). After considering the recorded testimony and evidence from the hearing, the review examiner's

decision, and the claimant's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Both parties responded. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the decision below, the claimant's appeal, and both parties' post-appeal submissions to the Board.

The issue on appeal is whether the claimant's injury and subsequent inability to perform her job duties for this employer rendered her involuntarily separated from employment as of August 22, 2009.

Findings of Fact

The review examiner's findings of fact are set forth below in their entirety:

1. On 8-15-08, the claimant filed a claim for unemployment benefits. She was determined to be eligible and collected benefits.
2. In May, 2009, the claimant found a new part-time job. The claimant worked as a bartender for the employer, a bar, from 5-19-09 to 8-22-09, at an hourly rate of pay plus tips. She reported partial earnings and collected partial unemployment benefits.
3. The claimant last worked on or about 8-22-09. She injured her arm at home and was unable to perform her job duties.
4. The claimant notified her employer of her inability to perform her job. Following medical evaluation, the claimant planned on having surgery. Both [sic] claimant's and the employer's intent was that the claimant would return to work following surgery.
5. When the claimant's unemployment benefits stopped, she also lost her health care coverage. When she was notified for the second time on 9-30-09 that she no longer had health coverage, the claimant concluded that she could not have surgery and would not be able to return to work at her bartending job. The claimant did not notify the employer that she would be unable to return to her job in the future and was quitting.
6. As a result of a redetermination under Section 71 of the Law issued on 10-28-09, the claimant was disqualified under Sections 29(a) and 1(r) beginning with the week ending 8-29-09 and indefinitely. She was found to be overpaid in the amount of \$221.00 for the three weeks ending 8-29-09 thru 9-12-09. The amount of overpaid benefits was cited as \$828.00.

7. The overpayment was due to an error without fraudulent intent on the part of the claimant.

Ruling of the Board

The Board adopts the review examiner's findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

The review examiner initially denied benefits under G.L. c. 151A, §§ 29(a) and 1(r). Section 29(a) authorizes benefits to be paid to those in total unemployment, which is defined at G.L. c. 151A, § 1(r)(2), and which provides, in relevant part, as follows:

"Total unemployment", an individual shall be deemed to be in total unemployment in any week in which he performs no wage-earning services whatever, and for which he receives no remuneration, and in which, though capable and available for work, he is unable to obtain any suitable work....

Our analysis also considers G.L. c. 151A, § 25(e), which provides in pertinent part, as follows:

An individual shall not be disqualified from receiving benefits under the provisions of this subsection, if such individual establishes to the satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

The review examiner initially denied benefits under G.L. c. 151A, §§ 29(a) and 1(r), concluding that the claimant was on an implied leave of absence from the employer, and was, thus, not in unemployment. After review, we conclude the claimant's injury rendered her involuntarily separated from work and, thus, eligible for benefits.

The review examiner found that after the claimant's separation from a prior employer, she was subsequently employed part-time by this employer. After working part-time for three months, the claimant injured her arm at home and was unable to perform her duties as a bartender for this employer. Although the parties intended for the claimant to return to work, her injury left her unable to do so.

We disagree with the review examiner's legal conclusion that the claimant was on an implied leave of absence. The claimant's circumstances are similar to those in Dir. of the Division of Employment Security v. Fitzgerald, 382 Mass. 159 (1980) (welder who was medically unable to perform her welding duties because of pregnancy was nevertheless eligible for benefits while on maternity leave where there were other light duty jobs for which she was capable to perform and actively sought while pregnant). Here, the claimant was ultimately unable to return to work in her bartending capacity because she was unable to afford the surgery necessary for her recovery.

Her inability to perform these job duties rendered her separated from employment as of August 22, 2009, when she last worked for the employer. However, there is no suggestion in the record that this injury prevented the claimant from being available for other forms of work, which did not require the use of the injured arm in lifting and carrying. We, therefore, conclude as a matter of law that the claimant's departure under these circumstances constitute an involuntary separation under G.L. c. 151A, § 25(e).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending August 29, 2009, and for subsequent weeks, if otherwise eligible.¹ Because we conclude that the award of benefits was proper, the claimant is not required to repay the benefits awarded during the three weeks at issue.

Because we conclude that the claimant's separation was involuntary for urgent, compelling, and necessitous reasons, the employer is to be relieved of charges for the costs of this claim, pursuant to G.L. c. 151A, § 14(d)(3).

BOSTON, MASSACHUSETTS

DATE OF MAILING - February 24, 2011

/s/

John A. King, Esq.
Chairman

/s/

Stephen M. Linsky, Esq.
Member

Member Sandor J. Zapolin did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)**

LAST DAY TO FILE AN APPEAL IN COURT- March 25, 2011

JPC

¹ We note that after a separate hearing regarding the claimant's separation from this employer, a different DUA review examiner has concluded the claimant's separation was involuntary, for urgent, compelling, and necessitous reasons, pursuant to G.L. c. 151A, § 25(e), effective the week ending September 5, 2009. See DUA Hearings Docket #541491. The employer did not appeal that determination to the Board and it is final.